United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1020

To be argued by
RICHARD APPLEBY

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1020

UNITED STATES OF AMERICA,

Appellee,

—against—

RAUL ARCE and FRANKLIN WILLIAM GRASSI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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RICHARD APPLEBY,
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Of Counsel.

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Preliminary Statement

This is an appeal from a judgment of conviction, entered on January 9, 1976, by the United States District Court for Eastern District of New York (Mishler, *Ch. J.*), following a jury trial convicting appellant, Raul Arce, of the armed robbery on March 14, 1975 of the Astoria Federal Savings and Loan Association, 31-24 Ditmars Boulevard, Queens, New York, in violation of Title 18, United States Code, Section 2113(d). Appellant received a 15 year term of imprisonment and is in custody pending this appeal.[1]

[1] Appellant was tried with co-defendant Franklin William Grassi, who was also convicted on Count Two and who also received 15 years imprisonment. Counsel for Grassi filed an *Anders* brief, and the United States has moved, by motion returnable on the day this case is scheduled for argument, for dismissal of his appeal.

The sole issue raised by appellant in this appeal is whether Judge Mishler's supplemental charge given during the course of the jury's deliberations ("I think you should know that if the jury fails to reach a unanimous verdict it means a declaration of a mistrial and a new trial, another jury will try the case, the lawyers in all probability will present a similar case to the jury . . .") constitutes reversible error.

Statement of Facts

The Government's chief witness was Joseph Garro, who was named in the same indictment with appellant and Grassi and who pled guilty to count two of the indictment prior to jail. Garro admitted committing "about a dozen" bank robberies (155).[2]

Garro testified that he had been friends with both appellant and Grassi for approximately three years prior to March, 1975 (159-160). On March 6, 1975 Garro and appellant stole a Thunderbird that they intended to use as a getaway car for the robbery of the Astoria Federal Savings and Loan Association in Queens. Garro telephoned Grassi that night and told him that he and appellant had been successful in acquiring the getaway car (164-166).

The next morning, March 7, the bank robbery was aborted just as the three were about to enter the bank, when appellant and Grassi got into an argument about who was to enter the bank's entrance first (174-176).

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[2] The Statement of Facts is based upon the testimony of Garro. The evidentiary corroboration of his testimony will be indicated in the footnotes. Page references in parentheses refer to pages of the trial transcript.

Undaunted, on March 13, 1975 the three decided to rob the same bank the following day. Having lost the Thunderbird, Garro, appellant and one Matthew Baimonte drove to the parking lot of Korvette's shopping center in Douglaston, Queens (182). While Garro waited in appellant's car, appellant and Baimonte stole a Pontiac Grand Prix from a woman at gunpoint.[3]

The following morning, March 14, Garro, Grassi and appellant met at Garro's house. Garro initially refused to accompany Grassi and appellant on the bank robbery because of the mix-up that had occurred the previous week (187). Appellant and Grassi left Garro's house but later returned that morning, urging Garro to accompany them on the robbery and assuring him everything would go smoothly. Garro agreed.

The three proceeded to the Astoria Federal Savings and Loan. Garro and appellant were armed with guns. All three carried ski masks and work gloves (189). Appellant's car was parked some distance from the bank and the three then drove in the stolen Grand Prix to the bank (190). Before entering the bank, appellant got out of the car to case the bank. When he returned to the car, appellant was carrying containers of coffee (190).[4]

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[3] Antoinette Danisi testified that on March 13, two men stole her Grand Prix from her at gunpoint (328-330). She was not able to make either an in-court or out-of-court identification of either defendant. However, she immediately reported the robbery to Henry Faison, Security Manager at Korvette's. After Danisi reported the incident and gave a general description of the robbers, Faison recalled having observed these men earlier that day in the parking lot. Faison made an out-of-court and in-court identification of appellant as one of the two men he had observed (345).

[4] A fingerprint expert from the Federal Bureau of Investigation testified that a latent fingerprint recovered from one of the coffee container lids found in the getaway car was that of appellant (397).

After donning their ski masks, the three then entered the bank simultaneously, Garro from the front entrance and Grassi and appellant through the rear entrance (191). Garro guarded the front door brandishing his .45 automatic; appellant controlled the center of the floor with his .45 automatic, ordering the customers to lie down on the floor; Grassi vaulted the counter and scooped up the money. Appellant suddenly began a countdown while looking at his wristwatch (192-193).[5]

The three exited the bank through the rear entrance and entered the stolen Grand Prix. They drove to appellant's car, abandoned the Grand Prix, and then proceeded to Grassi's house where they divided $12,000 in cash (194). The three then changed their clothing and discarded the clothes they had worn in the robbery (194-196).

Garro also testified to a subsequent bank robbery committed by all three men on April 3, 1975 at the Jamaica Savings Bank, Flushing, Queens, in which the identical *modus operandi* was employed (205).[6]

Neither defendant put in a defense case.

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[5] A teller did not identify either defendant since the robbers wore ski masks. However, she corroborated Garro's testimony concerning the manner in which the robbery occurred (318).

[6] Judge Mishler did not permit similar act evidence to be introduced concerning five other bank robberies committed by all three defendants, and two additional bank robberies committed by Garro and appellant on the ground that the *modus operandi* was not identical (39).

ARGUMENT

There was nothing improper in the supplemental charge given by Judge Mishler.

Relying on *United States* v. *Domenach*, 476 F.2d 1229 (2d Cir. 1973), appellant asserts that one sentence contained in a supplemental charge given by Judge Mishler during the course of the jury's deliberations—"I think you should know that if the jury fails to reach a unanimous verdict it means a declaration of a mistrial and a new trial, another jury will try the case, the lawyers in all probability will present a similar case to the jury . . ." (531)—warrants a reversal. This contention is meritless.[7]

The jury began its deliberation at 12:30 P.M. After eating their lunch and after having testimony read to them for twenty-five minutes, the jury sent in a note at 4:45 P.M. saying that it could not reach a unanimous verdict (530). Judge Mishler called the jury in and charged as follows:

> The Court: I have your note saying that the jury cannot reach a unanimous verdict. I don't know whether you understand that if you reach a unanimous verdict as to either defendant, you can return that verdict; you need not reach a unanimous verdict as to both.
>
> I am going to ask you to return to the jury room to deliberate further on the matter. I think you should know that if the jury fails to reach a unanimous verdict it means a declaration of a mistrial and a new trial, another jury will try the

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[7] Grassi does not raise this contention as a "possible issue" in his *Anders* brief.

> case, the lawyers in all probability will present a similar case to another jury. Now we have already gone over that and I want to make certain in my own mind that you have really exhausted the possibility of reaching a verdict.
>
> Now please return to the jury room in the light of new instructions and you tell me whether you would like to continue deliberations tonight or whether you would like to suspend tonight and come back tomorrow.
>
> The jury is excused.
>
> (The jury then left the courtroom) (530-531).[8]

Shortly thereafter the jury sent in another note, informing the judge that it wished to adjourn until the following morning. Judge Mishler excused the jury. The following morning the jury resumed its deliberations at 9:45 A.M. At 11:35 A.M. the verdicts were returned (541-542).

In *Domenach, supra*, 476 F.2d at 1237, appellant also took issue with a similar statement made by the trial judge to the jury. While not "commending the statement for general use" this Court held that the statement was not unduly coercive.[9] We believe that appellant's reliance on *Domenach* is wholly misplaced. In *Domenach* the remark by the trial judge was made at the end of a full-blown *Allen* charge. There is no support in the *Domenach* opinion for the proposition that the disputed sentence alone is improper. Here the statement was made not in

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[8] Counsel for appellant did object to this instruction by the judge (532). However, he did not request, nor did he offer, any curative instruction.

[9] The Court noted that in *United States* v. *Thomas*, 282 F.2d 191, 195 (2d Cir. 1960) this language was also sustained.

the context of a full *Allen* charge but rather as part of an instruction to the jury that it could return partial verdicts. Moreover, the statement in *Domenach* has to be read in the context of its facts. In that case there was a real fact issue as to whether a similar case would be given to another jury in the event of a mistrial. Here, appellant has not even claimed, nor could be, that a retrial would not be carbon copy of this trial.

Even giving full play to the Court's *dictum* in *Domenach*, we submit that no coercion was inherent in Judge Mishler's remark. First, in his main charge Judge Mishler stated:

> Now each juror must decide the case for himself or herself. There are two extreme positions that are improper:
>
> One is the juror that comes into the jury room and says in effect, Well, you decide the case and I will go along with whatever you say. They call me Agreeable Abe or any other description. That would not give the litigants a unanimous verdict of twelve jurors.
>
> The other is the juror that comes into the jury room and in effect says, Well, I have already made up my mind and when the other eleven of you come around to my way of thinking, we will have a verdict. That intransigent, obdurate position is obviously wrong, too.
>
> The deliberation process is an exchange of views. Go over the evidence. There are times when you may arrive at a tentative verdict and then after going over the evidence with your fellow jurors you might be convinced that the first determination was wrong. There is nothing wrong in changing your mind if it is supported by the evidence (514-515).

We do not believe that the remark by Judge Mishler in his supplemental charge diluted the impact of these instructions.

Second, we do not see how it can be said that Judge Mishler was coercing the jury when he made this remark in the context of giving the jury the option of either continuing their deliberations that afternoon or returning the following morning.[10] The fact that the jury did elect to suspend for the day—after only three hours of deliberations—indicates that they were not cowed by the judge's remark. Furthermore, whatever hypothetical coercive effect may have been inherent in the statement, was diluted, if not extinguished, by the hiatus in the deliberations.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
March 26, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
RICHARD APPLEBY,
Assistant United States Attorneys,
Of Counsel.

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[10] At no time during the deliberations did the jury reveal to the court the number of jurors in favor of conviction or acquittal.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 26th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John C. Corbett, Esq.	George Sheinberg, Esq.
66 Court Street	66 Court Street
Brooklyn, N.Y. 11201	Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
26th day of March, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

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